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A Survey of Recent Developments in the Law: Employment Discrimination Law

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EMPLOYMENT DISCRIMINATION LAW

A. *The United States Supreme Court Tackles the ADA*

Commentators and historians alike will label 1999 as the year of the American with Disabilities Act (ADA)[1] in the U.S. Supreme Court. On June 22, 1999, the U.S. Supreme Court handed down a trilogy of decisions that better defined who is a covered employee under the ADA.[2] The central issue in all three decisions asked whether courts should consider "mitigating measures" to determine if a person is substantially limited in a "major life activity" and therefore "disabled" and under the protection of the ADA.

Congress enacted the ADA to prohibit employers from discriminating based on the disability of an otherwise qualified employee.[3] The Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) implement and regulate certain ADA provisions.[4] Although not given authority over the ADA section containing the definition of "disability," the term now in question, the two agencies have issued guidelines regarding the proper interpretation of the term.[5] Both agency regulations state an employee's "disability" should be measured without mitigating measures.[6] The federal circuits differed in their opinion on the issue.[7] In the trilogy, the U.S. Supreme Court

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1. *See* 42 U.S.C. §§ 12101-12213 (1994).

2. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).

3. *See Sutton*, 119 S. Ct. at 2143; *see also* 42 U.S.C. § 12112(a) (1994). The Act defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

4. *See Sutton*, 119 S. Ct. at 2145.

5. *See id.*

6. *See id.* at 2145-46.

7. The Eighth Circuit, for example, decided those with correctable conditions have a disability under the ADA. *See, e.g.*, Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997).

contradicted the EEOC and DOJ and held the determination of whether a person is "disabled" should be determined with corrective measures in place.[8] The holding will affect a large number of Americans, in effect shutting out most employees who use "mitigating measures."

In *Sutton v. United Air Lines, Inc.*,[9] twin sisters with severe myopia[10] applied for employment positions as commercial airline pilots with United Air Lines, Inc. (United).[11] The myopia left the sisters with vision no better than 20/200 without corrective lenses, yet 20/20 or better vision with corrective lenses.[12] The sisters met all other qualifications for the pilot positions.[13] United rejected the applications and informed the sisters all applicants needed uncorrected vision of at least 20/100 for employment as pilots.[14]

The sisters filed a claim in federal district court and alleged that United discriminated against them based on their disability, in violation of the ADA.[15] More specifically, the sisters alleged the myopia substantially limited them in major life activities or at least United regarded them as having an impairment, therefore they met the definition of "disabled" under the ADA.[16] The district court dismissed the sisters' complaint.[17] The court reasoned the sisters could completely correct their impairments and therefore did not have a defined "disability" under the ADA.[18] The Tenth Circuit followed the district court reasoning and affirmed.[19] The Court stated, "In making disability determinations, we are

8. *See Sutton*, 119 S. Ct. at 2146-47.

9. 119 S. Ct. 2139 (1999).

10. Myopia is defined as: "An abnormal eye condition in which light rays from distant objects are focused in front of the retina instead of on it, so that the objects are not seen distinctly; *nearsightedness*." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 897 (3d ed. 1996) (emphasis supplied).

11. *See Sutton*, 119 S. Ct. at 2143.

12. *See id.*

13. *See id.* The sisters already held positions as commercial airline pilots for regional carriers but desired to fly for a "major" carrier like United. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 895 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

14. *See Sutton*, 119 S. Ct. at 2143.

15. *See id.* The sisters went through the proper procedures, including obtaining a right to sue letter from the Equal Employment Opportunity Commission. *See id.*

16. *See id.* at 2143-44.

17. *See id.* at 2144.

18. *See id.*

19. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 902-03 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

concerned with whether the impairment affects the individual in fact, not whether the impairment would hypothetically affect the individual without the use of corrective measures."[20]

The U.S. Supreme Court granted the petition for certiorari to resolve a circuit split on the issue.[21] The Court first considered the question of whether the sisters were disabled under ADA section 12102(A), namely, whether they had physical impairments limiting them in one or more major life activities.[22] The Court stated the answer turned on whether it should take mitigating measures into account.[23] The Court acknowledged that both EEOC and DOJ suggested "mitigating measures" are not considered.[24] Both parties accepted the EEOC and DOJ power to regulate generally.[25] United argued the specific EEOC and DOJ interpretive guidelines on this issue directly contradicted ADA language and therefore the Court should disregard them.[26] United argued that "[T]he phrase 'substantially limits one or more major life activities,'. . . requires that the substantial limitations actually and presently exist."[27]

Justice O'Connor, writing for the majority, agreed.[28] The majority held the ADA mandated courts and employers to take into account corrective measures and their effects, both positive and negative.[29] The majority had three different rationales for the result.[30] First, Congress couched the Act's language in the "present indicative verb form" and required a person be presently, not hypothetically substantially limited in order to demonstrate a disability.[31] "A 'disability' exists only where an impairment

20. *Id.* at 902.

21. *See* Sutton v. United Air Lines, Inc., 525 U.S. 1063 (1999). Those circuits in tension with the Tenth Circuit held to varying degrees that disabilities should be determined without reference to mitigating circumstances. *See* Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-66 (1st Cir. 1998); Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997).

22. *See Sutton,* 119 S. Ct. at 2146.

23. *See id.*

24. *See id.* at 2145.

25. *See id.* at 2145-46.

26. *See id.* at 2146.

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

'substantially limits' a major life activity, not where it 'might,' 'could' or 'would' be substantially limiting if mitigating measures were not taken."[32] The Court held the ADA language was not ambiguous and therefore persons taking medication or wearing glasses are not presently "substantially limited" while taking those measures.[33] Second, the Court stated a person's disability "is an individualized inquiry" according to the ADA's express language.[34] Abandoning mitigating measures in the determination ran directly contrary to ADA language and would require courts and employers to speculate about how a condition "usually affects individuals."[35] Finally, the Court determined Congress did not intend to bring such individuals under ADA protection.[36] The Court used statistical Congressional findings enacted with the ADA and determined Congress envisioned persons without corrective measures as those individuals "disabled" and under ADA protection.[37] The majority reasoned if Congress intended the ADA to cover all those using corrective measures, Congress would have adopted higher statistical numbers.[38]

With the major issue decided, the majority considered whether United regarded the sisters' disabilities as substantially limiting their ability to work, a major life activity.[39] The Court held United properly precluded the sisters from the specific positions of "global airline pilot" and not positions in the broad class of working.[40]

Justice Stevens, joined by Justice Breyer in dissent, argued common rules of statutory construction command that courts and employers measure a person in past or present physical conditions.[41] Stevens argued a general rule of statutory construction commands the Court to interpret the ADA in light of the purpose Congress sought to serve in enacting the statute.[42]

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32. *Id.* at 2146.
33. *See id.* at 2146-47.
34. *Id.* at 2147; *see also* 42 U.S.C. § 12102(2) (1994).
35. *See Sutton*, 119 S. Ct. at 2147. The court gave the example of a diabetic who would always be considered disabled because if he failed to take his insulin injections he would be substantially limited in major life activities. *See id.*
36. *See id.* at 2147-48.
37. *See id.* Congress found 43 million Americans suffered from one or more physical disabilities. *See id.* at 2147.
38. *See id.* at 2148-49.
39. *See id.* at 2149.
40. *See id.* at 2151.
41. *See id.* at 2152 (Stevens, J., dissenting).
42. *See id.* at 2153.

Congress intended the Act to protect the past and presently disabled, a sweeping definition intended to cover all employees.[43] Stevens, using a hypothetical person missing an arm stated, "[I]n my view, when an employer refuses to hire the individual 'because of' his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act."[44] Stevens also argued the majority improperly refused to examine ADA legislative history to resolve the ambiguities.[45] Stevens cited, among other documents, a Senate report stating, "whether a person has a disability should be assessed without regard to the availability of mitigation measures, such as the reasonable accommodation or auxiliary aids."[46] Stevens chastised the majority for what he called a "crabbed vision" and argued the ADA clearly covered such individuals.[47]

With *Sutton* as the catalyst, the U.S. Supreme Court issued two related cases on the same day. In *Murphy v. United Parcel Service, Inc.*,[48] the United Parcel Service (UPS) hired Vaughn Murphy, a mechanic, to work in the commercial motor vehicles department.[49] The position required Murphy to drive commercial motor vehicles.[50] Department of Transportation (DOT) requirements mandated such a driver not have a "clinical diagnosis of high blood pressure."[51] At the time UPS hired him and unknown to UPS, Murphy had extremely high blood pressure.[52] UPS mistakenly granted Murphy job certification and he began work.[53] A review of Murphy's file and a retest soon revealed the mistake and UPS fired Murphy less than two months after he had begun based on the

43. *See id.*
44. *Id.* at 2154.
45. *See id.*
46. *Id.* (citing S. REP. NO. 101-116, at 23 (1989)).
47. *See id.* at 2161. The Eighth Circuit Court of Appeals has applied the analysis used in *Sutton*. *See* Belk v. Southwestern Bell Tel. Co., 194 F.3d 946, 950 (8th Cir. 1999) (holding employee affected by polio and required to wear a leg brace is still "disabled" under the ADA where the leg brace's negative effects substantially limit the employee while walking).
48. 119 S. Ct. 2133 (1999).
49. *See id.* at 2136.
50. *See id.*
51. 42 U.S.C. § 391.41(b)(6)(1994).
52. *See Murphy*, 119 S. Ct. at 2136.
53. *See id.* Murphy's blood pressure actually measured 186/124 when hired. *See id.* Doctors first diagnosed Murphy hypertensive at the age of ten. *See id.* Unmedicated, Murphy's blood pressure measured about 250/160. *See id.*

belief that the blood pressure exceeded DOT requirements.[54]

Murphy brought suit under the ADA.[55] The district court granted summary judgment for UPS and found Murphy not disabled since he could use medication to lower his blood pressure.[56] The district court found Murphy not "disabled" under the ADA and also not "regarded as" disabled.[57] The Tenth Circuit Court of Appeals affirmed.[58]

The U.S. Supreme Court granted certiorari.[59] Justice O'Connor, again writing for the majority, quickly answered in the affirmative the issue of whether the disability is measured with reference to the mitigating measures.[60] The majority ruled that when medicated, Murphy's high blood pressure did not substantially limit him in "any major life activity."[61] The majority refused to consider the negative effects of the medication because it was not an issue before the court.[62] Murphy also argued he was "regarded as" disabled due to his high blood pressure.[63] An employee is "regarded as" disabled "if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities."[64] UPS argued Murphy did not meet DOT standards, the only reason for his dismissal.[65]

The Court affirmed and relying heavily on its decision in *Sutton*, reasoned: "[T]he undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life

54. *See id.*
55. *See id.*
56. *See* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D. Kan. 1996), *aff'd*, 141 F.3d 1185, No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998), *aff'd*, 119 S. Ct. 2133 (1999).
57. *See Murpy*, 946 F. Supp. at 881-82.
58. *See* Murphy v. United Parcel Serv., Inc., 141 F.3d 1185, No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998) (unpublished judgment and order), *aff'd*, 119 S. Ct. 2133 (1999). The court of appeals used its own decision in Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999), to make the ruling. *See Murphy*, 1998 WL 105933, at *2.
59. *See* Murphy v. United Parcel Serv., Inc., 525 U.S. 1063 (1999).
60. *See Murphy*, 119 S. Ct. at 2137.
61. *See id.*
62. *See id.*
63. *See id.*
64. *Id.*
65. *See id.*

activity of working."[66] Again, Justices Stevens and Breyer dissented.[67]

Finally, in the last case of the trio, *Albertsons, Inc., v. Kirkingburg*,[68] the U.S. Supreme Court decided a slightly different issue. While *Sutton* and *Murphy* decided the issue in regard to artificial aids, such as corrective lenses and medication, in *Albertsons*, the Court answered the issue with respect to the body's natural corrective devices.[69] Albertsons, Inc. hired Hallie Kirkingburg as a truck driver.[70] The DOT required that all such commercial drivers meet federal vision standards.[71] Kirkingburg, at the time Albertsons hired him, suffered from amblyopia[72], which left him with 20/200 vision in his left eye, however, an erroneous doctor certification allowed Kirkingburg to meet the vision standards.[73] Once on the job, Kirkingburg injured himself and took leave.[74] In his attempt to return to work after the injury, Kirkingburg submitted to a required physical.[75] The examining doctor discovered the vision problem and Albertsons fired Kirkingburg.[76]

Kirkingburg sued under the ADA.[77] The district court granted the Albertson's summary judgment motion.[78] The district court agreed with Albertson's argument that Kirkingburg was not qualified without accommodations.[79] The Ninth Circuit reversed.[80] First, the Ninth Circuit rejected Albertsons' new argument that

66. *Id.* at 2139.

67. *See id.* (Stevens, J., dissenting). Stevens dissented citing his dissent in *Sutton* and reaffirmed his view Murphy had a "disability" under the ADA because the hypertension severely limited his ability to perform major life activities. *See id.*

68. 119 S. Ct. 2162 (1999).

69. *See id.* at 2169.

70. *See id.* at 2165.

71. *See id.* The regulations required corrected vision of at least 20/40 in each eye and distant binocular vision of at least 20/40. *See id.*

72. Amblyopia "is a general medical term for 'poor vision caused by abnormal visual development secondary to abnormal visual stimulation.'" *See id.* at 2166 n.3 (citing K. WRIGHT ET AL., PEDIATRIC OPHTHALMOLOGY AND STRABISMUS 126 (1995)).

73. *See id.* at 2165-66.

74. *See id.* at 2166.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See* Kirkingburg v. Albertson's, Inc., 143 F.3d 1228 (9th Cir. 1998), *rev'd*, 119 S. Ct. 2162 (1999).

Kirkingburg was not "disabled" under the ADA.[81] The court stated, "Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for this disability, the manner in which he sees differs significantly from the manner in which most people see."[82] Second, the Ninth Circuit reversed the district court because Albertsons did not allow Kirkingburg to apply for a waiver according to DOT regulations.[83]

The U.S. Supreme Court granted certiorari, reversed the Court of Appeals, and held Kirkingburg was not "disabled" under the ADA.[84] The Court stated that the proper standard under the ADA is "significant restriction" not "significant difference."[85] The Ninth Circuit's linguistic change undercut the ADA's purpose.[86] Importantly, the Court further stated the Ninth Circuit did not take into account Kirkingburg's ability to compensate for the deficiency.[87] The Court cited the *Sutton* decision and stated, "We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[88] Accordingly, the Court ruled Kirkingburg not "disabled" under the ADA.[89]

In its final point, the Court rejected the waiver argument posited by the Ninth Circuit, finding that the waiver program did not modify the general safety visual standards and employers could reject the program if so inclined.[90]

B. ADA Damages and Social Security Benefits Can Get Along

In *Cleveland v. Policy Management Systems Corp.*, the U.S. Supreme Court held an employee's claim for Social Security Disability Insurance (SSDI) benefits did not automatically estop the same employee from filing an ADA claim.[91] The Court held the two claims did not inherently conflict, thus, courts should not apply

81. *See id.* at 1232.
82. *Id.*
83. *See id.* at 1235-36.
84. *See Albertsons*, 119 S. Ct. at 2167-69.
85. *See id.* at 2168.
86. *See id.*
87. *See id.* at 2168-69.
88. *Id.* at 2169.
89. *See id.*
90. *See id.* at 2174.
91. 526 U.S. 795, 803 (1999).

a negative presumption when the employee files the ADA claim.[92] The issue arose because the SSDI program provides benefits to those "unable to work," while the ADA protects those who with reasonable accommodations could perform the essential functions of the job.[93]

Carolyn Cleveland suffered a stroke and lost her job.[94] Shortly thereafter, Cleveland applied for and obtained Social Security Disability Insurance benefits.[95] On the SSDI application, Cleveland stated she was "unable to work" because of her disability.[96] Before Cleveland actually received her SSDI award,[97] she filed an ADA suit against Policy Management Systems (Policy Management), her former employer.[98] Cleveland claimed Policy Management violated the ADA when it failed to reasonably accommodate her disability.[99]

The district court granted Policy Management's summary judgment motion based on its finding that by "applying for and receiving SSDI benefits, [Cleveland] conceded that she was totally disabled."[100] With this concession, Cleveland could no longer prove she could "perform the essential functions" of the job with "reasonable accommodations," as required by a successful ADA claimant.[101] The Fifth Circuit affirmed, yet noted that under unusual circumstances a SSDI benefits claim and an ADA claim may not be "necessarily be mutually exclusive."[102] With that recognition, the circuit court adopted a test requiring the mere application for or receipt of SSDI benefits created a "rebuttable presumption" that the claimant is estopped from an ADA claim.[103]

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92. *See id.*

93. *See id.* at 797; *see also* 42 U.S.C. § 12111(8) (1994); 42 U.S.C. § 423(d)(2)(A)(1994).

94. *See Cleveland*, 526 U.S. at 798.

95. *See id.*

96. *See id.*

97. *See id.* The Social Security Administration (SSA) actually first denied Cleveland's SSDI application after her conditioned improved and she returned to work. *See id.* After the termination, Cleveland asked the SSA for a reconsideration of the SSDI benefits, the SSA then granted the benefits retroactively. *See id.* at 798-99.

98. *See id.* at 799.

99. *See id.* Cleveland claimed Policy Management denied her basic accommodations such as training. *See id.*

100. *Id.*

101. *See id.*

102. Cleveland v. Policy Management Sys., Corp., 120 F.3d 513, 517 (5th Cir. 1997), *rev'd*, 526 U.S. 795 (1999).

103. *See id.* at 518.

The U.S. Supreme Court granted certiorari to resolve the disagreement among the Federal Courts of Appeals on the issue.[104] The U.S. Supreme Court vacated the circuit court decision and held:

> [T]he two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here. That is because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.[105]

To rationalize the holding, the Court first noted that both the Social Security Act and the Americans with Disability Act help disabled individuals, although differently.[106] The Court determined the ADA defined a "disabled individual" in the context of a "reasonable accommodation," a context the Social Security Administration (SSA) does not use.[107] In order to process the large number of SSDI claims, the SSA determination is more akin to a legal conclusion.[108] The Court also stated SSDI benefits are often given to those currently working or returning to work as a transition back into the workforce.[109] Over this transition period, a SSDI claimant's disability may improve, causing the initial SSDI application statement to be inaccurate at a time of the ADA claim.[110] Finally, the Court used the legal system as a brace and recognized the type of inconsistency between SSDI and ADA positions is of the "sort normally tolerated by our legal system."[111]

However, the Court did not make it that easy for claimants. Although it struck down the "negative presumption" rule espoused by the circuit court, the U.S. Supreme Court held a claimant that claims an inability to work on a SSDI application, cannot ignore the

104. *See Cleveland*, 526 U.S. at 800 (1999).
105. *Id.* at 802-03.
106. *See id.* at 801. The court noted that the SSDI helps disabled persons monetarily, while the ADA "seeks to eliminate unwarranted discrimination." *Id.*
107. *See id.* The Court stated it would be nearly impossible for the SSA to take into account "reasonable accommodations" due to the inherently factual nature of the issue and due to the fact the SSA receives more than 2,500,000 disability claims every year. *See id.*
108. *See id.* at 802.
109. *See id.* at 805.
110. *See id.*
111. *See id.*

contradiction but must "proffer a sufficient explanation" for it.[112] The Court remanded the case to let Cleveland offer a sufficient explanation.[113]

A major victory for disability claimants, the ruling in *Cleveland* now allows the "disabled" individual to find shelter under two federal protection statutes.[114]

C. *The ADEA Surfaces Bringing Bad News for State Employees in Federal Court*

The Age Discrimination in Employment Act (ADEA) surfaced in the U.S. Supreme Court in the new millennium's very first days.[115] On January 11, 2000 the U.S. Supreme Court handed down its decision in *Kimel v. Florida Board of Regents*,[116] which dealt a major blow to state employees filing ADEA claims in federal court.[117] The ADEA prohibits employers from discrimination against individuals with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's age; . . ."[118]

Upon passage of the ADEA in 1967, the Act only applied to private employers.[119] However, in 1974, Congress, by Congressional

112. *See id.* The standard for this explanation to defeat summary judgment must "be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'" *Id.* at 807.

113. *See id.* at 807.

114. As a possible indicator of the result of future cases, the Eighth Circuit has applied *Cleveland* and not allowed recovery. *See* Loeb v. Trans World Airlines, Inc., 198 F.3d 250, 1999 WL 813758, at *1-2 (8th Cir. 1999) (unpublished) (claimant "failed to explain sufficiently how her sworn representations to SSA that she was unable to work as of July 26, 1993, were consistent with her claim that she could perform her job with accommodation").

115. Amazingly on the same day, the Minnesota Court of Appeals handed down Raygor v. University of Minn., 604 N.W.2d 128, 132-33 (Minn. Ct. App. 2000) (stating the dismissal of Minnesota Human Rights Act claim and ADEA claim in federal court did not bar state claim filed in state court).

116. 120 S. Ct. 631 (2000). The Eighth Circuit passed on a similar yet different issue: Whether Congress had the power to abrogate the state Eleventh Amendment immunity for ADA claims. *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc) (stating Congress did not have the power to abrogate); DeBose v. Nebraska, 186 F.3d 1087, 1088 (8th Cir. 1999) (same).

117. *See* Joan Biskupic, *Court Curbs Suits By State Workers; Continuing a Pattern, 5-4 Ruling Bars Claims of Age Bias Under Federal Law*, THE WASH. POST, Jan. 12, 2000, *available in* 2000 WL 2279421 (describing the ruling as a defeat for the nation's five million state employees).

118. 29 U.S.C. § 623(a)(1)(1994).

119. *See Kimel*, 120 S. Ct. at 637.

Amendment, extended the ADEA to the states.[120] Congress amended 29 U.S.C. section 630(b), to include in the definition of employer "a State or political subdivision of a State . . ."[121] At the same time, Congress amended the Fair Labor and Standards Act enforcement provisions, incorporated by reference into the ADEA, permitting claimants to bring civil action "against any employer in any Federal or State court of competent jurisdiction."[122] In *Kimel*, the Court determined whether Congress had the clear intent and constitutional authority to abrogate state immunity.[123] The Eleventh Circuit Court of Appeals consolidated three cases with exactly that issue.[124] In all three, state agency employees filed ADEA suits in federal court.[125]

In *Kimel*, the title case, past and present faculty and librarians filed suit in federal district court against their employer, the Florida Board of Regents, and alleged age discrimination.[126] The claim centered around an alleged fund misallocation to certain employees with a disparate impact on older employees.[127]

The Florida Board of Regents (Board) moved to dismiss the suit.[128] It based the motion on Eleventh Amendment immunity.[129] The district court denied the motion and found that Congress clearly expressed an intent to abrogate Eleventh Amendment states' immunity in enacting the ADEA, and Congress had

120. *See id.*
121. *See id.*
122. *Id.* at 637-38. Firefighters and law enforcement officers' mandatory age limits are exempted. *See* 5 U.S.C. § 3307(d)(e) (1994); 29 U.S.C. § 623(j) (1994 & Supp. III 1997).
123. *See Kimel*, 120 S. Ct. at 640.
124. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), *aff'd*, 120 S. Ct. 631 (2000).
125. *See* MacPherson v. University of Montevallo, 938 F. Supp. 785, 786 (N.D. Ala. 1996). In *MacPherson*, two associate professors filed suit in federal district court claiming age discrimination due to an evaluation procedure that they claimed had an adverse effect on older employees and claiming retaliation after they filed discrimination charges with the EEOC. *Id.* at 786; *see also* Dickson v. Florida Dept. of Corrections, No. 5:9cv207-RH (N.D. Fla. Nov. 5, 1996). In *Dickson*, a state employee filed suit in federal court and claimed age discrimination when his employer failed to promote him. *See id.* He also claimed his employer fired him in retaliation after he filed a discrimination report. *See id.*; *see also* Kimel v. Florida Bd. of Regents, TCA 95-40194 MMP (N.D. Fla. May 17, 1996).
126. *See Kimel*, 120 S. Ct. at 638.
127. *See id.*
128. *See id.*
129. *See id.*

constitutional authority to do so.[130] In the consolidated appeals[131] the Eleventh Circuit held the ADEA did not abrogate state Eleventh Amendment immunity.[132] A divided panel differed in the basis for the decision. Judge Edmundson based his decision on his belief that Congress did not intend to abrogate and found no clear language that employees could sue a state in federal court.[133] The second judge, steering clear of Congressional intent, found Congress did not have the authority under Section five of the Fourteenth Amendment to abrogate state immunity.[134]

The U.S. Supreme Court granted certiorari to address the conflict among the circuit courts of appeal on the issue.[135] Justice Sandra Day O'Connor, writing for the Court in a five to four decision,[136] affirmed the court of appeal's decision.[137] First, the majority found "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[138] The Court cited the following language of 29 U.S.C. section 626(b) as clear intent: "against any employer (including a public agency) in

130. *See id.*

131. The United States intervened to defend the ADEA's abrogation of state Eleventh Amendment immunity. *See id.* at 639.

132. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1432 (11th Cir. 1998), *aff'd*, 120 S. Ct. 631 (2000).

133. *See id.* at 1430.

134. *See id.* at 1445.

135. *See Kimel*, 120 S. Ct. at 639. Only one circuit, the Eighth Circuit, joined the Eleventh Circuit in its view until *Kimel*. *See* Brief for Petitioner, at 14 n.13, Kimel v. State of Fla. Bd. of Regents, 1999 WL 503876; *see also* Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822, 825, 827-28 (8th Cir. 1998) (stating no express clear intent to abrogate and no Congressional power to abrogate). The other eight circuit courts of appeal deciding the issue held the ADEA "clearly and permissibly abrogates State immunity from suit in federal court." *See* Petitioner's Brief, at 14 n.13; *see also* Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761, 766, 772 (7th Cir. 1998); Cooper v. New York State Office of Mental Health, 162 F.3d 770, 774 (2d Cir. 1998); Coger v. Board of Regents, 154 F.3d 296, 307 (6th Cir. 1998); Keeton v. University of Nev. Sys., 150 F.3d 1055, 1057 (9th Cir. 1998); Scott v. University of Miss., 148 F.3d 493, 500 (5th Cir. 1998); Hurd v. Pittsburgh State Univ., 109 F.3d 1540, 1546 (10th Cir. 1997); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3d Cir. 1996) (dictum); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 700-01 (1st Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977).

136. Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas joined O'Connor in the majority. *See Kimel*, 120 S. Ct. at 636.

137. *See id.* at 650.

138. *Id.* at 640 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

any Federal or State court of competent jurisdiction."[139] The Court rejected the Board's "ambiguity" arguments and decided the plain language satisfied the stringent test.[140]

The second prong of the test, whether Congress acted pursuant to a valid exercise of constitutional authority, raised more difficulty.[141] The state employees argued that Section five of the Fourteenth Amendment granted Congressional authority to abrogate state immunity from suit in federal court.[142] The Court recognized the wide grant of authority Congress has "both to remedy and to deter violation of rights guaranteed thereunder . . . ."[143] At the same time, the Court emphasized the same amendment served to limit Congressional power.[144] The Court made its determination by applying the "congruence and proportionality" test, which states: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[145] The Court applied the test and concluded Congress did not have constitutional authority under Section five of the Fourteenth Amendment to abrogate state immunity under the ADEA.[146] Central to its holding, the Court reminded all that age is not a suspect classification.[147] The Court in conclusion tried to offer some consolation to state employees:

> Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.[148]

139. *See id.*
140. *See id.* at 640-41.
141. *See id.* at 642.
142. *See id.* at 644.
143. *Id.*
144. *See id.*
145. *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).
146. *See id.* at 645.
147. *See id.* at 645-46.
148. *Id.* at 650.

Justice Stevens, dissenting in part,[149] found little relief in the statement. Stevens found the majority's "judicial activism" offended Congressional federalism, and believed Congress acted clearly and appropriately with states' best interests in mind.[150]

D. The Eighth Circuit Decides a Matter of First Impression

In *Cossette v. Minnesota Power & Light*,[151] the Eighth Circuit Court of Appeals decided an issue of first impression.[152] At stake were employee rights under the ADA. The Eighth Circuit held the ADA protects victims of unauthorized medical condition disclosures by an employer even though the employee is not "disabled."[153]

Diane Cossette held down two jobs, one with Minnesota Power & Light and another as a waitress.[154] While waitressing, Cossette fell and injured her back, which in turn led to a finding of 10.5% total disability.[155] Cossette continued working at Minnesota Power & Light.[156] Three years after the accident, Cossette's supervisor, without reason, suspected Cossette was mentally impaired.[157] The supervisor ordered Cossette to undergo testing which showed normal ranges of cognitive ability.[158] Another supervisor revealed these perceived intellectual deficiencies to other employees.[159] The same supervisor also revealed Cossette's medical history to a prospective employer, the United States Postal Service.[160] Due to the unfavorable reference, the Postal Service did not hire Cossette.[161]

Cossette sued Minnesota Power & Light, asserting nine claims,

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149. Joining Justice Stevens in dissent were Justices Souter, Ginsburg, and Breyer. *See id.* (Stevens, J., dissenting in part).
150. *See id.* at 651-52.
151. 188 F.3d 964 (8th Cir. 1999).
152. *See id.* at 969. One other Eighth Circuit district court answered the question in the negative. *See* Adler v. I & M Rail Link, L.L.C., 13 F. Supp.2d 912, 935-37 (N.D. Iowa 1998).
153. *See Cossette*, 188 F.3d at 969.
154. *See id.* at 966.
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.* at 967.
160. *See id.*
161. *See id.* At the time Cossette brought the present suit she was working for the Postal Service. *See id.*

the most significant being illegal disclosure of confidential information claim under the ADA.[162] The ADA protects employees from an employer's unauthorized disclosure of the employee's medical conditions.[163] In an oral ruling, the district court granted Minnesota Power & Light's motion for summary judgment.[164] Cossette appealed.[165]

The Minnesota Court of Appeals first addressed the district court's finding that Cossette could not recover because she was not "disabled within the meaning of the Act."[166] The district court reasoned Cossette did not have a disability, therefore, the unauthorized disclosures did not implicate the ADA.[167] The court of appeals disagreed.[168] Unlike the ADA's prohibition on disability discrimination, the disclosure of confidential information section plainly suggests it applies to all "employees" and "applicants."[169] The court cited decisions from other jurisdictions to further support its position the claimant need not be disabled to bring a claim for improper confidential disclosures.[170] The court stated that of significance was the fact Minnesota Power & Light did not cite contrary authority at the federal circuit level to rebut Cossette's interpretation.[171]

The court addressed a secondary issue on the requirement that Cossette show actual tangible injury from the disclosure.[172] The court found Cossette created a genuine issue of material fact when she showed she tested better than other applicants, yet the Postal Service still passed her over.[173] Therefore, Minnesota Power

162. *See* 42 U.S.C. §§ 12112(d)(3)-(4) (1994); *see also Cossette*, 188 F.3d at 968.
163. *See* 42 U.S.C. § 12112(d).
164. *See Cossette*, 188 F.3d at 968. The trial judge did not eliminate the claim of confidential disclosures to employees in his written ruling. *See id.* After the court of appeals dismissed for lack of jurisdiction, the trial judge granted summary judgment for Minnesota Power & Light on the remaining claim. *See id.*
165. *See id.*
166. *See id.* at 969.
167. *See id.*
168. *See id.*
169. *See id.* Compare this assertion to the ADA's language on the general prohibition that states employers shall not "discriminate against a qualified individual *with a disability*." 42 U.S.C. § 12112(a)(1994)) (emphasis supplied).
170. *See Cossette*, 188 F.3d at 969-70; *see also* Fredenburg v. Contra Costa County Dep't of Health Serv., 172 F.3d 1176, 1181-82 (9th Cir. 1999); Griffin v. Steeltek, Inc., 160 F.3d 591, 593-94 (10th Cir. 1998); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997).
171. *See Cossette*, 188 F.3d at 970.
172. *See id.*
173. *See id.*

& Light's disclosure to the Postal Service may have caused injury.[174]

The court considered next the question of injury caused by the supervisor's disclosure about Cossette's perceived intellectual deficiencies to other Minnesota Power & Light employees.[175] On that issue, the court reversed the district court's grant of summary judgment for Minnesota Power & Light and remanded the issue back to the district court.[176] However, the court did mention "Cossette's claimed injury of being treated in a condescending and patronizing manner falls short of an 'adverse employment action' that would be required to establish a prima facie case of disability discrimination under 42 U.S.C. section 12112(a)."[177]

E. Minnesota Court of Appeals Assists Minnesota Human Rights Claimants

The Minnesota Human Rights Act prohibits an employer from discharging an employee because of a disability.[178] However, where there is no direct evidence of discrimination, the plaintiff and defendant have shifting burdens of proof in the case.[179] The Minnesota Court of Appeals on February 15, 2000 laid out the standard courts should use for the plaintiff's burden in summary judgment.[180] In *Hoover v. Norwest Private Mortgage Banking*, the Minnesota Court of Appeals adopted the standard followed by most federal circuit courts and in the process produced a slightly easier burden for claimants.[181]

Physicians diagnosed Dianne Hoover, a private mortgage banker with more than twenty years experience, four of those years spent at Norwest, with fibromyaligia, a disease with chronic pain symptoms.[182] Hoover informed her employer of the diagnosis but did not request special accommodations.[183] In the same year,

174. *See id.*
175. *See id.* at 971.
176. *See id.* at 972.
177. *Id.* at 971. The Court affirmed the district court's grant of summary judgment on the retaliation claim. *See id.* at 972. The Court held the timing between when Cossette filed the EEOC report and a unfavorable performance evaluation was not enough to establish a prima facie case of retaliation. *See id.*
178. *See* MINN. STAT. § 363.03, subd. 1(2)(b)(1998).
179. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
180. *See* Hoover v. Norwest Private Mortgage Banking, 605 N.W.2d 757, 760 (Minn. Ct. App. 2000).
181. *See id.* at 765.
182. *See id.* at 760.
183. *See id.*

processing personnel informed Norwest of compliance problems in Hoover's files.[184] Norwest soon terminated Hoover.[185] Hoover then filed a complaint against Norwest under the Minnesota Human Rights Act (MHRA).[186] The district court granted Norwest's summary judgment motion on all claims including the discharge claim and failure to reasonably accommodate.[187]

The Minnesota Court of Appeals first laid out the test of shifting burdens under the MHRA.[188] First, the plaintiff's burden is to establish a prima facie case of discrimination.[189] If the plaintiff establishes the prima facie case, it is the employer's burden to rebut the prima facie case by presenting evidence of a nondiscriminatory, legitimate reason for the termination.[190] If the employer succeeds, the employee must show the employer's reason for the adverse employment action is actually a pretext for discrimination.[191]

Hoover met the first element of her prima facie case when she showed her twenty years of experience together with her positive performance evaluations until the time of her discharge, otherwise qualified her for the position.[192] However, Hoover also had to show a triable issue existed on her disability.[193] Norwest appropriately conceded that fibromyaligia was an impairment under the MHRA.[194] However, the MHRA requires more.[195] The impairment must also "materially limit" a major life activity.[196] To satisfy this prong, Hoover had to show she was restricted in her ability to perform a class of jobs or a broad range of jobs compared to the average person having comparable training, skills and abilities.[197] Norwest argued Hoover failed to show that she had applied for and been denied a job because of her disability, therefore not producing enough evidence to show where her impairment was

184. *See id.* at 761.
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.* at 762.
193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.*
197. *See id.*

"materially limited."[198] The court of appeals drew a distinction between refusal-to-hire cases, that the requirement originated from, and Hoover's situation.[199] "Requiring all disability plaintiffs to show jobs for which they have applied and not been hired is too broad an application of *Carl Bolander*."[200] In a move some practitioners may call unusual, the court of appeals reversed the district court and found Hoover met the prima facie case with a vocational expert and medical opinion evidence that she was "materially limited" in work activities.[201]

The court of appeals quickly found Norwest met its burden when it rebutted Hoover's prima facie case with Hoover's failure to comply with federal banking industry regulations.[202] The burden then shifted back to Hoover to show that Norwest's reason was merely a pretext for the discharge.[203] The court addressed next the issue of what evidence Hoover must produce to survive summary judgment.[204] Citing a conflict in the federal circuit courts of appeals, the court chose between two standards; survival on summary judgment required either: (1) "evidence that the employers' articulated reason for discharge is unworthy of belief"[205] or (2) "in addition to demonstrating that the articulated reason is unworthy of belief, the plaintiff's evidence of pretext must give rise to an inference of intentional discrimination."[206]

The court of appeals' split resulted from differing interpretations of the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.[207] The court recognized Minnesota courts have applied the first, less stringent burden in the past, but have not addressed it since *Hicks* in the summary judgment context.[208] Relying on pre-*Hicks* court reasoning and the circuit majority

198. *See id.* at 763.
199. *See id.*
200. *Id.* at 764. The requirement for proof of job applications and denials originated in Sigurdson v. Carl Bolander & Sons, Co., 532 N.W.2d 225, 228-29 (Minn. 1995).
201. *See Hoover*, 605 N.W.2d at 764.
202. *See id.*
203. *See id.*
204. *See id.* at 765
205. *Id.*
206. *Id.* The court points out there is an apparent split within the Eighth Circuit. *See* Stanback v. Best Diversified Prod., Inc., 180 F.3d 903, 912 (8th Cir. 1999).
207. 509 U.S. 502 (1993).
208. *See Hoover*, 605 N.W.2d at 765; Doan v. Medtronic, Inc., 560 N.W.2d 100, 105 (Minn. Ct. App. 1997).

position, the Minnesota Court of Appeals accepted and adopted the less stringent evidence burden.[209] The court did not require the evidence to "support a reasonable inference of intentional discrimination," an issue the plaintiff must ultimately prove at trial.[210]

Hoover presented evidence Norwest did not place a high priority on compliance.[211] Hoover also showed that Norwest knew of other violators yet did nothing.[212] The court held Hoover met the "unworthy of belief" standard and held that the district court improperly granted summary judgment.[213]

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209. *See Hoover*, 605 N.W.2d at 765.
210. *See id.* at 765-66
211. *See id.* at 766.
212. *See id.*
213. *See id.* Showing the difficulty of prevailing, the court of appeals affirmed summary judgment on Hoover's claims of failure to make a reasonable accommodation, reprisal and the claim for negligent supervision. *See id.* at 766-68.